YALE
LAW JOURNAL

VOL. XVI. APRIL, 1907. No. 6

THE EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE IN TIME OF WAR.*

We all rejoice to note the progress, during the last forty years, of the cause of international arbitration. This Association from the outset has given its best help to that movement. But, undoubtedly, the same period, even to its close, has proved that war is still an event which must be expected to recur. It has seemed to me, therefore, neither useless nor unseasonable, in the cool atmosphere of present peace, favoring fair discussion, to submit to this Conference a few remarks upon the subject of a change in the rules of maritime warfare which has received considerable support in many quarters. It is an important as well as a very debatable topic. I dare to hope that everyone here will try to examine it, so far as is justly possible, from a cosmopolitan standpoint, and not merely, or chiefly, in relation to the supposed gain or loss of the particular country to which he may belong. "Nothing is more common than to confound, and yet nothing is more important than to distinguish, that which strictly belongs to the province of law and that which properly pertains to the domain of policy. Policy might possibly suggest that which law, nevertheless, disallows; and, on the other hand, law might permit what policy, notwithstanding, would dissuade."[1] We are not gathered together in this room, as diplomats meet at the Hague, to compose matters of international controversy, clothed with the dignity of national representation and charged with the special and sacred care of national interests. Ours is a different and a humbler rôle. We are merely volunteers from many nations, associated in the desire to further the common good of all by contributing, through suggestion and discussion, to the improvement of the law which ought to govern the dealings of humanity in time of war as well as in time of peace.

* This paper was read at the Berlin Conference of the International Law Association in October, 1906.—[ED.]

1. *Letters by Historicus on International Law* (London and Cambridge, 1863), p. 3.

There is no doubt that, whereas, since the year 1856, in the case of war between any of the Powers who have acceded to the Declaration of Paris, the neutral flag has covered enemy's goods, with the exception of contraband of war, a belligerent is acting in strict accordance with international law who captures at sea and, through proceedings in a competent prize court, confiscates and sells the merchant ships of subjects of the enemy state, together with any goods belonging to such subjects as the ships may contain, and makes prisoners of their crews. The proceeding in the prize court is an inquest held upon the captured property in order to discover whether it has been lawfully captured or not. It is especially a safeguard against the violation of the rights of neutrals. But in the case of ships captured at sea, and their cargoes, if they do belong to the enemy, there is no doubt that the property in them passes directly to the state of the captors when an effectual seizure has taken place; and it is therefore legal, in certain circumstances, to destroy the prize instead of taking it into port. Such circumstances are the practical impossibility of the latter course, owing to the storminess of the weather and the unseaworthy condition of the prize; the imminent risk of recapture by the enemy; the great distance of any port to which the prize could be taken; and the inability of the captor to spare a sufficient prize crew. In such cases the destruction of the prize is held to be justifiable, on the ground of necessity; and one cannot but fear that the preciousness of her coal to the modern cruiser, the great injury to her fighting power from any serious diminution of her crew, and the growing indisposition of neutrals, which Hall notes, to admit prizes within the shelter of their waters, will tend in the future to multiply the cases in which a captor will judge that his duty compels him not to attempt to bring the captured vessel into harbor. But modern feeling is against the propriety of destroying a prize, unless very good ground can be shown for it; and Hall states[2] that the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary. I do not think that the government of any belligerent state now would instruct its naval officers, as America did at the outbreak of war with Great Britain in 1812, to "destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception."[3]

The right of capture and, if necessity dictates such a course, of destruction, in regard to enemy's property at sea, is subject, so far as I am aware, to few recognized qualifications. The immunity of hospital ships and their contents is in the position of a rule which

2. *International Law*, 5th edition, p. 458.
3. Hall, ib., p. 457.

governs those nations who adhere to the Hague Convention of 1899 on Maritime Warfare. I cannot doubt that this immunity will obtain universally in practice among civilized nations. The immunity of in-shore fishing boats appears to me, if one may presume to differ from the opinions of some foreign jurists, to be rather a precept of international comity than a rule of international law. Certainly it is not an absolute rule. Any obligation ceases if there is an actual user of such vessels for naval purposes, *e. g.*, as spies or transports, or reasonable grounds can be shown for an apprehension of such user. Deep-sea fishing—*la grande pêche*—has never enjoyed even conditional immunity; but of the indulgent treatment, in these days of less rigorous warfare, both of all kinds of fishing boats, whilst in use as such, and of vessels engaged in scientific discovery or in carrying cargoes of works of art or educational instruments and material (for which isolated precedents already exist), one may, I think, rest assured. And the same may be said as to the practice of granting a period of grace to such enemy merchant ships as happen to be in the port of a belligerent at the outbreak of war or arrive there within a limited period after its commencement. Humanity of conduct, as was shown in the recent Spanish-American war in regard to privateering, often anticipates law.

The capture of private property by the enemy at sea is an ancient usage. The work known as the *Consolato del Mare, or Costumbres Maritimas,* compiled in the earlier half of the fourteenth century, treats it as a matter of course; and that work contains the earliest collection of the general customs and practices of European states in their maritime relations. The correctness of the usage stood unchallenged until the end of the eighteenth century; and the occasional assaults upon it since then, so far as they are professedly based upon ethical principle, are based upon untenable theories, for which Rousseau appears to be ultimately responsible, that between belligerent nations, the private persons of whom those nations are composed are enemies only by accident; that they are not so as men, or even as citizens, but only as soldiers; that a state can have only other states for enemies, and not men, because no true relations can be established between things of different natures.

The unsoundness of such doctrines has been ably exposed by Hall and by Westlake, in their well-known writings upon international law.[4] I shall quote briefly from the latter writer:

"If no true relations can be established between states and men, it must be impossible for men not only to be enemies but also to be

4. Hall, *International Law*, 5th edition, pp. 65-67; Westlake *International Law*, 1894, pp. 259-264.

the citizens or members of a state, and, if it is only as soldiers that men are enemies, even accidentally, every measure employed in war with reference to the civil population, including the most moderate requisitions, contributions and interferences with their liberty, must be unlawful. That legal situation would make war almost impossible. . . . War establishes between each of the states which are party to it, and the subjects of the enemy state, a relation which entitles the former to treat them as identified with their state; in other words, as enemies, so far as the necessities of war require under the limitations which are recognized as being imposed by humanity. This measure is different for combatants and for the peaceable population, as the necessities and limitations referred to are different for them; but the difference does not arise from any absence in the one case of a relation existing in the other. The men who form a state are not allowed to disclaim their part of the offenses alleged against it, . . . or, therefore, to claim that hostile action shall not be directed against their state through them in their respective measures. And this is just. Whatever is done or omitted by a state, is done or omitted by the men who are grouped in it; or, at least, the deed or omission is sanctioned by them. That must be so, because a state is not a self-acting machine."

"Whilst the power of creating corporations with limited liability may well be granted to individuals by states which can impose the conditions and exercise the control necessary to prevent injustice, ethical principle must condemn the claim that men acting in groups, not subject to regulation by a superior, can repudiate their personal responsibility and leave outsiders to seek their only satisfaction from the means with which they have chosen to clothe the group."

To separate the state from the individuals who compose it is, as Hall observes, to reduce it to an intangible abstraction. The true position appears to me to be well put in Arts. 20 and 21 of the American Instructions for the Government of Armies in the field:—

"Public war is a state of armed hostility between sovereign states or governments. It is a law and requisite of civilized existence that men live in political continuous societies, forming organized units, called states and nations, whose constituents bear, enjoy, suffer, advance, and retrograde together, in peace and in war. The citizen or native of a hostile country is, then, an enemy, as one of the constituents of the hostile state or nation, and, as such, is subjected to the hardships of the war."

It is not, however, to be concluded from the antiquity of a usage or from its defensibility in point of ethical principle, that its abolition, absolutely or conditionally may not at some time become both proper and practicable. Unless the influence of Christianity and

the progress of civilization are now but empty phrases, the recognition of the claims of humanity upon the conduct of belligerents ought to continue to deepen and widen. There was once a time when, even amongst the most civilized peoples, the course of the successful invader was commonly marked by the devastation of the land, the destruction or confiscation of private property, and the enslavement of women and children. In the centuries which followed the downfall of the Roman Empire, the influence of a Christianized civilization began gradually to soften the asperity of warfare. The Church wielded a restraining and regulative, and generally, a pacific force; questions of international morality drew the attention of her doctors. The spirit of mediæval chivalry contributed to the elevation of a standard of honor in the conduct of war, to respect for the persons and the property of defenseless non-combatants, and to a gentler and more generous treatment of the foe who failed. In the sixteenth century came the Reformation; and the Reformation "brought with it a new fury of fighting, and the wars of religion were among the most ferocious that mankind had waged."[5] But the same century, towards its latter end, made compensation to humanity. It gave birth to the founder of the science of international law. To assert and to popularize, as Grotius and the great publicists since his time have done, the idea of an unwritten code regulating the reciprocal relations of independent states, illustrated and evidenced, indeed, by the conventions and the usages of nations, but resting upon ethical principle as its base, was a signal service in the cause of humanity. During the two-and-a-half centuries which have passed since Grotius taught, both statesmen and jurists, while professing to conform to international law, have, it is true, not infrequently disagreed amongst themselves as to what the rule of international law was, or as to the applicability of an acknowledged rule to a given case. In the heat of war acts have been done which no principle or precedent could be found to justify. Learned expounders of international law have sometimes failed to discern between the law as it is, and the law as in their opinion it should be, or have laid themselves fairly open to the imputation of political partisanship. Nevertheless, in the course of this same period, not only has international law been systematized, and its sphere enlarged, but, although sanctionless and devoid of legislative or judicial authority, it has acquired a great and a growing influence upon the conduct of the world. There stands behind it the formidable force of public opinion, which, in these days of swift and easy

5. Sir H. Maine, *International Law*, p. 123.

intercommunication, can manifest itself with promptitude and effectiveness. "An offender against the obligations of international law is seriously weakened by the disapprobation he incurs."[6] In order to confer upon amendments of international law the strongest moral cogency, attempts, beginning with the Declaration of Paris, have been made to substitute the solemn declaration of an international congress for the inferences to be drawn from the opinion of jurists, the evidence of usage, and treaties concluded between individual states. The subject of this paper is the consideration of the proposal, as it is in substance, to amend the Declaration of Paris, by moulding it so as to include within its terms the exemption from capture (subject to the law as to contraband of war and blockade-running) of all private property at sea, and by thus procuring the assent of the United States, the one dissentient in 1856, to obtain for the Declaration, in its amended form, a place in the Code of International Law.

I do not intend—indeed, I do not think it would be becoming—to express a judgment as to the decision to which a council of the family of nations ought to come. My main purpose is to submit to this conference some suggestions and criticisms as to the reasons, *pro* and *con.*, which have been put forward either on the humanitarian or the practical side of the enquiry. But before doing so, I think it may not be uninteresting if I record briefly the history of the movement in favor of this proposal to change the existing law.

So far as I am aware, the first publicist who advocated the proposed change was the Abbé de Mably, who was a diplomatist and statesman as well as an authority on international law. I have not had an opportunity of consulting his published work, *Le droit public de l'Europe fondé sur les Traités, depuis la paix de Westphalie jusqu'à nos jours,*[7] written about the middle of the eighteenth century. But I have had access to a trustworthy analysis of that portion of it which deals with the matter in hand. The argument of the learned Abbé in favor of the proposed change is based, in some degree, upon humanitarian grounds, but mainly upon considerations of advantage to the great commercial nations and especially to England. The real originator, however, of the movement in favor of the change was Benjamin Franklin, twenty-five years later. The eyes of the civilized world were then drawn to the young nation of the Western Hemisphere, which was just opening the first page of its great destiny; and all that its founders said and did in matters

6. Sir H. Maine, *International Law*, p. 221.
7. First edition, 1748.

of international interest naturally received peculiar attention. A treaty of peace between the United States and Great Britain was being negotiated. In letters to Mr. Oswald, one of the British plenipotentiaries, in 1783, and to Mr. Benjamin Vaughan in 1785, Franklin urged the policy of an agreement that, in case of future war, unarmed merchant ships on both sides should pursue their voyage unmolested. At his instance, in 1784, an article was submitted to the British commissioners embodying Franklin's views, and providing also that neither nation should issue letters of marque. Great Britain dissented. But in 1785 (the year of the death of the Abbé de Mably) Franklin, Jefferson and Adams, representing the United States, successfully negotiated a treaty, containing similar terms, with the King of Prussia, which subsisted for a few years. The official American view, thus first promulgated, has remained constant. Successive administrations since Franklin's time have given it expression in messages to Congress and in instructions to their representatives abroad, and in communications made to foreign governments. In 1856 America, through Mr. Secretary Marcy, offered to adhere to the Declaration of Paris if the signatories would include in the Declaration the immunity of enemy's private property at sea. At the Hague Conference in 1899, the American commissioners, under the presidency of Mr. White, presented the following proposition:—

"The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels of military forces of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers."

For reasons which it would be irrelevant to narrate here, there was no discussion or vote upon this proposition, but the Conference (the delegates of Great Britain and France not voting) passed a resolution that the whole subject should be included in the programme of a future Conference. Italy, in recent years, has shown a disposition to accede to the American view. The Marine Code of 1865 declared that the capture of mercantile vessels of a hostile nation was abolished in the case of any state which should adopt reciprocity of treatment. In 1871, Italy concluded with the United States a treaty of commerce containing the exemption, subject to the condition of reciprocity. At the Hague Conference of 1899, the Italian government, through Count Nigra, formally expressed its general support of the principle of the inviolability of private prop-

erty on the high seas in time of war. No other state, so far as I can discover, has indicated, by official pronouncement, any definite decision upon the merits of the question. In 1866, when Prussia, Austria and Italy were engaged in war, the principle of the immunity of enemy merchant ships was adopted. In the Franco-Prussian war of 1870 the existing law was acted upon, Prussia being willing, and France unwilling, to grant the immunity.

The action of the American and Italian governments is itself a clear indication that a great deal of support for the proposed change of law exists in the communities for which they speak, and there can be no doubt that a considerable body of favorable opinion has grown up elsewhere. In the eighteenth century the concurrence of the Neapolitan Abbé Galiani (writing "by command") added nothing to the weight of the opinion of the Abbé de Mably, which I have already cited. For us lawyers of to-day, the adhesion of jurists, such as Sir Henry Maine and Hall amongst my own countrymen, and Calvo, De Laveleye, and Bluntschli (to mention only a few amongst eminent foreign supporters of the change) abroad, is sufficient warrant for a serious consideration of the question. At meetings of the Institute of International Law, held at the Hague in 1875, and at Turin in 1882, resolutions in favor of the change were carried. Papers on the subject were read at the Buffalo Conference of this Association in 1899, and at the Chicago Congress of Lawyers and Jurists in 1905. But, without doubt, most important factors in the development of a public feeling against the law as it stands have been the prodigious growth of maritime commerce during the last half-century and its complex ramification throughout the world. Commerce has become an elaborate and highly sensitive organization. The dislocation or suspension of any important branch of its trade will result in consequences which will be felt over half the globe. In regard to a commodity valuable for food, or as raw material for manufacture, the capture or destruction by a belligerent of a few cargoes, or even the risk of it, may affect the price of that commodity in every market. It is not only the enemy buyer or the enemy seller or the enemy carrier who is injured. The commerce of the world, as a business man has well said, is "dependent upon the efficient operation of a vast and complicated mechanism of exchange, which now, through the telegraph, brings constantly under its silent but effective guidance the whole industrial world." To propose to destroy commerce is to propose to inflict an injury which cannot be confined to those on whom it first falls. Even the immediate and direct loss to the enemy owner of the ship or cargo captured in many cases is made good to him at the expense of a neutral through the

contract of insurance effected with underwriters in a neutral state. The indirect injury, in a war between two great maritime powers, will certainly extend to many neutrals.

And so, in more countries than one, for some time past, there has been growing up amongst business men a considerable feeling in favor of the proposed change. Nearly fifty years ago Chambers of Commerce at Manchester, at Bremen, at Marseilles, and, I believe, at Hamburg also, declared that the law as to capture of enemy's private property at sea ought to be altered. In 1871 an International Maritime Congress at Naples came to a similar conclusion. And I have the authority of Perels for the statement that a resolution to the like effect was passed in April, 1868, at a session of the Reichstag of the North German Confederation.[8]

Of course, in weighing opinions expressed by governments, or by jurists, or by commercial men, for or against the proposed change in international law, those with whom the decision will rest will not fail to bear in mind that this is a question upon which even an entirely honest thinker must find it hard to be really impartial. Patriotism is a source of natural bias, against which it is difficult for either statesman or jurist to guard, and from which, indeed, it is not desirable that we should be entirely free. The judgment of those who devote themselves to commerce, may, unconsciously, be influenced by special considerations, which are deserving careful attention, but which must not be confounded with zeal in the cause of humanity.

I propose, with your leave, to see, in the first place, how the matter stands in regard to this last-named matter of humanity, which is much insisted upon as affording strong reason for the proposed change.

The right of war is, I suppose, as Vattel and Tetens and Azuni have said, the law of necessity, to which everything yields, and which is founded on the irresistible propensity of men to provide for their self-preservation. It is the law which commands the belligerent to deprive his enemy of every means of becoming stronger or more capable of attack, to weaken him by every possible mode, to prevent the augmentation of his forces and the prolongation of war, and to compel him to sue for peace. This involves the doing of acts which,

8. Manuel de droit Maritime International traduit de l'Allemand par L. Arendt, Paris, 1884.

Anyone who wishes to appreciate mercantile views upon this question, which I have briefly indicated, would do well to read two treatises, composed by a very competent English exponent of these views, Mr. J. T. Danson. They are entitled respectively *Our Commerce in War* and *Our Next War*, and were published in London in 1894 and 1897.

viewed abstractly and apart from all other relations, are acts of evil-doing. But, as necessity is the justification for war itself, so the acts done in the conduct of war must be at least reasonably necessary for the attainment of the objects of war. The loss and suffering caused must not be disproportionately great as compared with the resulting advantage. "The general principle is that in the mode of carrying on war no greater harm shall be done to the enemy than necessity requires for the purpose of bringing him to terms. This principle excludes gratuitous barbarities, and every description of cruelty and insult that serve only to exasperate the sufferings or to increase the hatred of the enemy without weakening his strength or tending to secure his submission."[9] The necessity, according to Tetens, may be judged of by the criterion, that the means employed to produce the effect be in proportion to the end for which they are employed. To obtain the object to be effectuated, we must not do more mischief than what is unavoidable in order to obtain it. This is a universal rule, applicable not only to the plan of operations against the enemy, but also to each single operation.[10] Whilst, however, in principle, necessity in war is omnipotent, and war is essentially inhuman, there is a degree of inhumanity in certain acts which is so intolerable that the usage of civilized nations, now crystallized, and imbedded in international law by the Hague Convention of 1899, has placed them as acts of land warfare in a catalogue of absolute prohibition. Other acts of land warfare, in the interest also of humanity, are, by the same convention, regulated and limited by conditions; and a third class of acts is held to be justified only if demanded imperatively by the necessities of war. In the first category are included *(inter alia)* the use of poison or poisoned arms, the massacre of prisoners, treacherous assassination, the attack or bombardment of towns, villages and habitations which are not defended, and pillage; in the second class are requisitions and demand of services, and the use of the enemy's railway plant, land telegraphs, telephones, etc., and all kinds of war material, even though those things are private property; in the third, the seizure or destruction of enemy's property. Now we are considering maritime warfare. How ought that to be conducted? No one, so far as I have heard or read, suggests that the capture of the enemy's merchant ships and their cargoes should be absolutely prohibited. We cannot suppose that any maritime state will allow vessels available as transports to assemble unmolested for the invasion of her

9. Sir Henry Maine, *International Law*, p. 138.
10. See Reddie, *Maritime International Law*, vol. ii, p. 143.

shores or to cruise unmolested as spies. No one has proposed that enemy's vessels should enjoy immunity if carrying contraband of war or running a blockade. The question put is this: Is it reasonable that the right of capture should be generally forbidden, and held justifiable only upon proof of some special necessity?

I am not, as I have already said, presuming in this paper to offer a judgment of my own on the case. I am simply desirous of drawing attention to those points which appear to deserve consideration.

Let us look first at the case as it is put forward on the humanitarian side. There is no doubt that the capture or destruction of enemy's merchant ships and enemy's cargo laden thereon, like most other active operations of warfare, involves personal suffering and loss to some non-combatants. The crew of the captured vessel become prisoners of war for the time, and the existence of the system of capture by causing a total or partial suspension of sea traffic takes away the means of livelihood from a large number of those who pursue avocations directly or indirectly dependent upon the continuance of the carriage of goods by sea. Nor is this hardship entirely confined to the subjects of one, or, if the belligerents are fairly matched in sea power, of both of the warring states. Similar classes of workmen in the neutral ports to which in time of peace the shipments from the belligerent nations used to go will be injuriously affected, although, to some extent, their loss may be mitigated by the continuance in neutral bottoms of the trade formerly carried on by ships of the belligerents. In the second place, there is also, of course, a loss to the wealthier classes of both the belligerent countries, who own the ships and the goods which are captured. There is the direct loss for which they may and generally would be indemnified by the underwriters. There is also the indirect loss, owing to a general interference with business, and also to the rise of freights and of insurance premiums which might, possibly, in time, result in a permanent transfer both of the carrying trade and of branches of mercantile business to neutral competitors. And, further, as I have pointed out in an earlier part of this paper, the sea-borne trade of one or both of two great commercial countries could not, in these days, be crippled or suspended by the operations of war without serious injury resulting to neutrals also in many parts of the world. All this mischief to mercantile interests (whether as affecting the belligerents or neutrals) is obviously a very important matter in itself. But I am by no means sure that it can, in strictness, be treated as a point in the humanitarian case. Something may be held to depend upon its ulti-

mate incidence, and this is a question for the political economist on whose realm I do not venture to intrude.

There is yet another argument to be mentioned, and it is one which is properly an argument of humanity. It is urged by some of those who favor the proposed change that the existing rule gives encouragement to attacks upon defenseless merchant vessels in order to obtain prize money, and thus tends to keep alive an ancient and discreditable notion that war may be waged by honorable men for their own private gain. But, in my humble judgment, the plea has, in these days, lost all practical weight. The danger referred to vanished (for America, since the war with Spain, may be treated as assenting to the Declaration of Paris) with privateering in 1856. If I rightly appreciate naval opinion, patriotic prudence, if nothing else, would now prevent the naval officers of a great Power from entertaining any temptations to chase merchant ships merely for the sake of private lucre. Such a proceeding, to use the words of a high authority,[11] is one "in which effect is frittered away in the feeble dissemination of the *guerre de course,* instead of being concentrated in a great combination to control the sea."

After reading and considering a great deal that has been spoken and written upon this subject of capture of enemy's private property at sea, I cannot help thinking that the force of the very considerable agitation, which has gradually grown up in favor of alteration, is largely, if not mostly, due to a moral sentiment—a feeling that to maintain a right, in general, to capture, and, if the circumstances, from the naval point of view, require, to destroy private property at sea, is to fall short of the moral standard of modern civilization in the conduct of warfare. Such a feeling is one of a noble sort. Emotional energy has helped in the past, and will help in the future, to do a great deal for the happiness of mankind. But to be truly useful, and not to do harm, it ought always to be guided by an accurate knowledge of facts, and by a just appreciation of the relation of facts to each other. I venture to suggest that, so far as the appeal for change is based upon a comparison of the treatment of private property in war on land and the treatment of private property in war upon the seas, the language and the reasoning, in not a few cases, of those who have made the appeal, are open to serious criticism. Private property is said to be respected in land warfare; and then it is asked, sometimes almost indignantly, and with much flourish of rhetoric, "Why is private property not respected in maritime warfare?" The capture of private property at sea has been

11. Mahan, *The Interest of America as a Sea Power*, p. 133.

denounced as if it was identical in character with the military pillage which is not one of the ways of modern warfare and which is absolutely prohibited by the express terms of the Hague Convention.

Now, there are three points as to which I wish to invite your attention in questioning the strength of this line of advocacy.

I.—First, there underlies the whole position an assumption that the degree of necessity which exists in maritime warfare for the capture of private property of the enemy is no greater than, or different from, the degree of necessity for the capture of private property in land warfare, it being granted, of course, that, in both cases alike, the test of justification of the conduct of war (not being the perpetration of any of the absolutely prohibited acts) is its reasonable necessity in order to achieve the end of war, that is to say, success.

Is this assumption sound? Are not the conditions of the two cases so different as to prevent there being any real analogy between the two operations? May it not be said with force that the private property on land which is exempt is private property the taking of which, in general, and excluding the special classes of private property which are within Art. 53 of the Hague Convention, could not reasonably be expected to affect the issue of war; whereas, at sea, the ships and the merchandise in transit on board of them, although privately owned, may not infrequently form no small portion of the national resources upon which the enemy must rely in order to persist in his resistance? I shall not offer an answer to these questions. But I may add in regard to enemy's ships that these questions do not lose in importance by reason of the fact that a daily increasing proportion of the vessels which are now used in commerce consists of large and swift steamers, readily available as transports and for the rapid acquisition and transmission of information of the enemy's movements and operations, or convertible into armed cruisers; whilst their crews in the engine-room and stoke-hole constitute valuable, because trained, recruits for the personnel of the modern warship. Russia, as far back as 1878, founded a "Volunteer" fleet, and Great Britain in 1887, and America in 1892, entered into special arrangements with certain steamship companies for the right of employment of steamers of these companies in government service.

II.—The second point in the appeal to which I desire to call attention is the fundamental statement that private property is respected in land warfare. Does not this allegation make far too much of the rule and far too little of the actual practice? Not fifty years ago a great general marched through Georgia and Carolina, devastating the hostile country as he went for reasons of military necessity. Would any commander in the field, in the enemy's coun-

try, hesitate—ought he, indeed, to hesitate—to demolish château or cottage or factory, or to cut down private woods or standing crops, if he judged it to be strategically necessary to do so in order to secure his own position in battle, or to weaken his opponent's? *Kriegsraison geht vor Kriegsrecht.* In the course of the same American War as that in which General Sherman made his celebrated march, the Federal troops seized, wherever they could find it, the privately-owned cotton, which constituted an important part of the resources of the Confederates. And in regard to such seizure, the Supreme Court of the United States has decided that it was lawful.[12]

III.—The third and last point is the comparison of capture of enemy's property at sea to the pillage which the Hague Convention has absolutely prohibited. I am, I confess, wholly at a loss to understand such a comparison. What pillage was in olden times we all know well—the licensed indiscriminate plunder of terrified and helpless families by an excited soldiery. What possible resemblance is there to this in the orderly and formal capture of a merchant ship by a man-of-war, and the orderly and formal condemnation of that ship and its cargo, if it be lawful prize, by a Court of Justice? The distinguished lawyer and statesman who at present holds the highest legal office in my country, but who was then Sir Robert Reid, wrote, in October last, a weighty letter to the *Times,* suggesting the favorable consideration of the proposed change, in the interest of Great Britain. But, in the course of that letter he remarked, and, as I respectfully maintain, with absolute truth: "No operation of war inflicts less suffering than the capture of unarmed vessels at sea."

I shall not, I hope, be deemed prolix if I add upon this point two quotations, one from an English and one from an American authority. Mr. Lawrence, who has held the post of Professor of International Law both in an English and in an American University, has put the case, as it seems to me, with great clearness:—[13]

"In fact, the superior humanity of land warfare exists more in name than in reality. Private property may still be captured at sea; on land it is exempt from seizure. There is a sharp contrast in the rules so far as words are concerned. But, if we leave expressions and deal with facts, we shall find that a country may be swept bare of supplies to feed the soldiers who hold it down by hostile force. Peasants may be impressed to drive their own carts for the invaders. The produce of the farmer, the stock of the trader, the stores of the

12. See, as to this, *Wheaton,* 4th English edition, p. 483.

13. *The Principles of International Law,* pp. 362, 363.

merchant, may go to fill the magazines of the enemy; and the slightest attempt on the part of the population to aid their fatherland by active means may expose them to all the horrors of military execution. It is true that the individual soldier is not allowed to plunder at his pleasure, but neither is the individual sailor. The capture of a merchantman is as regular and orderly a proceeding as the levy of a requisition upon a country town. In both cases private property is taken, but taken by disciplined agents of the enemy state acting under public authority. If there be any moral superiority, it is on the side of the maritime transaction; for a boat's crew engaged in the search and capture of a trading vessel can be kept under more complete supervision than a foraging party engaged in taking grain and stock from a country village; and, moreover, the presence of women and children in the one case, and their absence in the other, suggest considerations which certainly do not favor the claim of superior humanity made on behalf of land warfare."

Hall makes a similar statement,[14] and at its close quotes this language from Dana:—"Maritime capture takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance."

I desire, before quitting the region of humanitarian argument, to call attention to the fact that there are those who oppose the immunity of private property on the very ground of humanity itself. What, they ask, is the ultimate object for which good and humane men should work? Surely, the cause of peace. Is it quite certain that, in respect of the interests of peace, war at sea may not be made too cheap, that the amount and area of economical loss by war may be too narrowly limited and so a powerful influence in restraint of war may be destroyed or seriously impaired? If you render maritime trade immune, you remove one of the worst terrors of war from the wealthier classes, the classes which, in some countries at any rate, are the chief directors of the national policy. Will a power be less likely to go to war if it no longer has either to defend its maritime commerce or to transfer it to a neutral flag? Sir Thomas Barclay adverted to this point in a paper read by him at the Buffalo Conference of this Association in 1899; it was the principal topic of an eloquent speech of Mr. Moorfield Storey, of Massachusetts, a delegate of the United States government, when addressing the St. Louis Congress of Lawyers and Jurists in 1905, upon a resolution which had been proposed in favor of the exemption from capture of private property at sea.

14. *International Law*, pp. 446-447.

I quote his concluding words: "I want to oppose war by everything that can be done. I do not want the citizens of a great country to feel that they can go out among the farmers of the country and say 'give us your sons, but our pockets are to be exempt from contribution.' If we are to have war, let it fall on the material resources of the country. You cannot bring people to peace as quickly by killing as you can by destroying their resources, and for that reason I am not inclined to pass this resolution. It tends to induce war to a gladiatorial show, like a football game, instead of making every man in the nation feel the effect of it."

Sir Henry Maine appreciates the argument, though, upon the whole, he does not deem it convincing. Writing upon the Declaration of Paris, he says:[15] "It may be asked whether it would tend to diminish wars if economical loss were reduced to the lowest point, and if hostility between nations resolved itself into a battle of armed champions, of ironclads and trained armies, if war were to be something like the contest between the Italian States in the Middle Ages, conducted by free companies in the pay of this or that community. I think that even thus modified, war would be greatly abated. But this is a subject which ought not to be taken for granted without discussion."

When we pass from the consideration of the present question on the humanitarian side, and approach its practical side, we enter a region in which the only trustworthy guides are the statesman and the naval expert. The opinion of a layman, like myself, would be worth nothing, and, even if I were bold enough to form a judgment, I should not deem such an occasion as this a fitting one for its delivery. The matter is one which would necessarily involve the consideration of the interests of particular nations; and that, as I stated at the outset, it is my set purpose to avoid. This much, however, I may say. The determination of those who will have, in a representative capacity, to discuss the question must depend in large measure upon the counsel which, in the interest of their respective countries, competent advisers may give, first, as to the value, in the present and in the future, of commerce-destroying for success in war, as to which there is evidently a wide difference of opinion (Mahan, for example, affirming that "blows against commerce are the most deadly that can be struck,"[16] and others maintaining an exactly opposite opinion[17]); and, secondly, as to the comparative advantage, on

15. *International Law*, p. 123.
16. *The Interest of America as a Sea Power*, p. 133.
17. See Lawrence, *Principles of Maritime International Law*, pp. 415, 416.
In November, 1856, Lord Palmerston, in an address to the Liverpool Chamber of Commerce, expressed the opinion: "If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals."

the other hand, which may result, under a change of practice, from the security during a war, of the continuance of a sea-borne supply of food and of the various materials upon which manufacturing industry is dependent.

I shall now bring this paper, which has already extended to a greater length than I should have desired, to a close with a few suggestions.

The first of these is that with the consideration by the nations of this question of the immunity of enemy's property at sea from capture in war should be linked the consideration of the subject of contraband of war. It has been truly said that, as long as it remains in its present chaotic condition, we must have constant bickering between belligerents and neutrals, and that if a great maritime war broke out powerful commercial states might find themselves drawn into hostilities almost against their will. The dangerous, and, to neutrals, very troublesome uncertainty that exists at present in regard to the treatment of articles which are *ancipitis* (or, *promiscui) usus,* ought to be remedied. It can be satisfactorily remedied only by an international agreement, clasifying contraband definitely and completely. An interesting illustration of the unsatisfactory nature of the position of the matter of contraband is afforded by the Parliametary paper of February last, which contains the correspondence between the governments of England and Russia in reference to the Russo-Japanese war. The relevancy of the question of contraband to the subject of our enquiry is this. It appears to me that, if the arbitrary decision of any belligerent (as is at present the case) may include every important article of commerce, such as provisions, trade materials, fuel, etc., in the list of contraband, little can be gained by a general exemption of private property from capture at sea. It appears to me, also, that it conceivably might make a great difference in the view which some nations would be willing to adopt in regard to the proposed change, if it were definitely settled law that some, at any rate, of the principal articles of sea-borne commerce, and, especially, food for human consumption and the raw materials required by peaceful industries, could never lawfully be treated as contraband of war unless the captor could show that the particular cargo was destined for use for naval or military purposes of the enemy either in the region of actual operations or elsewhere.

And, further, with the question of the exemption of enemy's private property from capture at sea, should there not be considered the propriety of a definite pronouncement that the bombardment by naval forces of defenseless and unfortified towns and places on the sea coast, or the threat of such bombardment in order to secure the

levy of contributions or compliance with requisitions should be forbidden? Some jurists, I believe, hold that by the tacit consent of nations, such conduct has already come into the category of forbidden operations. I cannot see sufficient justification for the view. In 1882 a distinguished French Admiral, writing on his own behalf, of course, and not officially, published the opinion that "armored fleets in possession of the sea will turn the powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and lay them in ruins or, at the very least, will hold them mercilessly to ransom;" and the writer was subsequently appointed Minister of Marine. Mahan evidently considers such a proceeding as not being prohibited by usage, for in the course of his argument in support of the existing system of capture of enemy merchant ships he says:[18] "Nor is there any among the proposed uses of a navy, *as, for instance, the bombardment of seaport towns,* which is not at once more cruel and less scientific." It is highly desirable that the matter should be finally concluded by common agreement. The settlement of this question, as well as the classification of contraband, might do something, at any rate, to influence favorably some of the maritime powers in their consideration of the immunity of private property at sea, as a question of policy.

Lastly, I venture to add that, although agreement as to a general immunity of private property of the enemy at sea may prove to be impossible, the collected representatives of the various members of the family of nations might be asked to consider whether some modification of the present system might not advantageously be adopted in the form of a particular exemption in favor of the vessels of the great steamship lines which carry mails and passengers everywhere along established routes, and upon whose continued regularity of service the intercourse and intercommunication of large portions of the globe are absolutely dependent. Effective guarantees must, of course, be taken against abuse of such a peculiar freedom, but it ought not to be impossible to frame such guarantees. It cannot be doubted that the arrangement would confer a very great boon upon mankind. I have found in a note in the French translation[19] of the work of Perels a precedent, on a small scale, for such a course as I have ventured to suggest for universal international agreement, in the postal treaty, which Perels there cites, concluded between Great Britain and Denmark in June, 1846.

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18. *The Interest of America as a Sea Power*, p. 163.
19. Arendt's Translation, p. 236.

With these suggestions I conclude a paper, which has run to a far greater length than I had hoped and intended, but which, nevertheless, leaves much unsaid upon a great subject of practical importance. I have not written in order to express an opinion for or against the change; I have simply tried, clearly and fairly, to lay before the Conference the most important points, as they seem to me, to be considered before the proposed change can be accepted, with a brief statement of the history of the question and of the principles which, as I venture to think, must govern its solution.

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